Supreme Court of the United States

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

No.

OSWALD RENDON,

Petitioner,

against

JEAN GOLDNER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable The Chief Justice and the Associate Justices of The Supreme Court of The United States:

Petitioner, Oswald Rendon prays for a writ of certiorari to be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action pursuant to its decision dated December 1, 1960.

Opinion Below

The opinion of the Court of Appeals (Swan, Clark and Medina, Circuit Judges), which affirmed the District Court for the Southern District of New York (Dimock, J.) is reported in 283 Fed. 2d 881. A copy of the opinion is contained in the Appendix at pages 12-14. There was no opinion by the District Court Judge.

Jurisdiction

The judgment of the Court of Appeals was entered on the 1st day of December, 1960. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this court is invoked under 28 U. S. C. A., Section 1254 (1).

Questions Presented

The question presented involves the propriety of a procedure in a jury trial which, it is submitted, is erosive of the traditional concept of what constitutes a fair jury trial and transcends the frame of reference here involved—a personal injury action. Specifically, the questions are whether

(1) the right to have a jury decide issues solely on the evidence and the law, free of any extraneous influences, is violated by the trial court's sending the reporter into the jury room to read the judge's charge in the absence of court and counsel.

(2) Whether objection to such procedure, duly made known to the trial court pursuant to Rule 46 of the Federal Rules of Civil Procedure, is waived by a failure to insist on it after an adverse ruling by the trial judge.

Statutes Involved

The statute involved is Rule 46 of the Federal Rules of Civil Procedure, 28 U. S. C. A.

Statement of Case

The plaintiff, Oswald Rendon, was a passenger in defendant's automobile. While proceeding along a country road in Blauvelt, N. Y., the car failed to make a left-hand curve, ran off the road and overturned, causing the plaintiff to sustain serious injuries. There was a jury trial before Judge Dimock in the United States District Court for the Southern District of New York.

After the jury had deliberated for some time, the jury sent a message that they desired to have the judge's charge read to them (105a). Defendant's counsel suggested that the reporter go into the jury room and read the charge to the jury (105a). Initially, plaintiff's counsel did not voice objection to the procedure.

Before the reporter went in, plaintiff's counsel reflected and had a change of mind. He told the court that such a procedure might lead to colloquy between the reporter and the jury, or between the jurors themselves, without the presence of counsel, and suggested that the reading of the charge should be done in the court room (106a). The court stated, however, that the reporter could be trusted to do nothing except to read the charge as it was (106a). The reporter was thereupon directed to go into the jury room and read the charge (106a-107a). The objection to the procedure was not repeated.

The jury rendered a verdict in favor of the defendant, a verdict which the trial court refused to set aside, although it stated that the jury's verdict would not have been his (119a), that he would have found the other way

(120a), that he thought the verdict was unusual and surprising (120a). No doubt the court voiced this sentiment because of the totally incredible nature of defendant's testimony.

The Version of July 22, 1957, the Night of the Accident

After the accident, when plaintiff was being taken to the hospital by ambulance, defendant accompanied him (12a). On the way there, she said: "Gee, I'm sorry Ozzie, I couldn't make the curve" (12a). The police officer, Lenahan, who had come to the scene pursuant to a radio call (24a), testified that defendant told him that she was going for a ride and ran off the road (38a). She did not say a word about skidding (38a). He testified he did not see any oil (25a, 27a) or skid marks (25a), and that the road had not been oiled (34a).

The July 30, 1957 Version—The Report to the Motor Vehicle Bureau

On July 30, 1957 the Motor Vehicle Bureau, at Albany, received a report from the defendant describing the accident (68a, 69a). In this report it was stated that a left curve "loomed up" ahead of her (69a). No mention was made in this report of oil as a contributing cause for the accident (69a). Although she claimed that the report was written by her father she admitted that she had told him what to write, had read what he had written and had subscribed to it (69a).

The January 28, 1958 Version—The Hearing in the Motor Vehicle Bureau

It was here that the explanation of skidding on an oily surface first appeared (20a). On this occasion she described the accident as follows:

"I was approaching and I hit the curve and applied my brakes, and as I applied my brakes the rear wheels began to skid. The road had just been re-surfaced with gravel and oil, as they do in the country. The car started to skid and it flipped" (19a-20a).

The Trial Version

At the trial she reasserted her explanation of skidding on an oily surface (58a, 64a). She also tried to avoid the implications of a lack of watchfulness and alertness implicit in her statement to the Motor Vehicle Bureau that the curve "loomed up", and in her testimony at the Motor Vehicle hearing that she "hit the curve" and then applied her brakes. She first repudiated the statement (67a), and then claimed that the expression "hit the curve" meant "approaching" (71a). She said that her prior expressions were a matter of "semantics" (69a, 71a).

What at one phase of her testimony was described as an instantaneous accident (58a), was now divided by her into a series of distinct episodes. First she saw the curve 300 feet ahead (65a). Then she made a decision to apply her brakes (65a). Then she translated her decision into action when she was fifty feet away from the curve (66a). Then she skidded on the oily surface (63a, 64a).

There can be no doubt that this claim of skidding on an oily surface was an afterthought. Apart from the fact that defendant's earlier statements contained not even the suggestion of an oily surface as a cause for the accident, there is the disinterested testimony of police officer Lenahan that he saw no oil on the road (25a, 27a), that he saw no skidmarks (25a), and that in point of fact the authorities in charge of the highway never used oil in maintaining the road (34a). Defendant conceded that when the accident occurred she knew nothing of oil (67a).

Contributory Negligence

Over objection by plaintiff's counsel (103a), contributory negligence was submitted as an issue. There was no

factual basis for such submission. There was no contention that anything plaintiff physically did contributed in any way to the occurrence of the accident which brought about his injuries. Concededly, all he was doing was to sit next to the driver and converse with her (65a).

The issue of contributory negligence that the court submitted to the jury was whether plaintiff failed to protest against any negligence in the manner of defendant's driving (95a-96a). At most, the distance travelled by the car from the point where defendant last stopped it and the point where the accident occurred was a half a mile. Defendant said it was 500 to 650 feet (19a, 70a). There is no proof whatever of anything that defendant did in those seconds of travel that plaintiff should have protested against.

Certainly it could not be a continuing speed violation. Defendant denied driving in excess of any speed limits (66a), and plaintiff was precluded from proving what the speed limit was (25a).

There was nothing ahead of plaintiff's vehicle to cause plaintiff to anticipate the possibility of an accident so as to invoke the need for a caution or protest.

It was suggested that plaintiff should have protested against driving with low-beam lights. Defendant denied being impeded or hindered in any way in her ability to see. She said the night was clear, visibility was good, that she could see 300 feet or more ahead of her (22a, 57a, 58a, 65a, 70a, 72a).

The duty to protest would arise only if plaintiff knew defendant was driving dangerously or under conditions that incapacitated her from seeing what she should see. Since plaintiff had no knowledge or any such incapacity, and defendant disclaimed it, there was no basis for a finding of contributory negligence for failure to protest.

It is clear from the foregoing that the surprising and unusual verdict was not based on the evidence, that it must have been engendered by something happening in the jury room which should not have been permitted.

Reasons For Granting the Writ

(1) It has been said:

"The jury system is founded upon the proposition that disinterested jurors will hear the evidence in open court, and upon that evidence and that evidence alone, deliberate amongst themselves until a verdict is reached (cases cited). To permit various persons, under one pretext or another, to be with the jury in its deliberations, is to open the door to grave abuse and to strike directly at the heart of the system. Without exception, as far as we are advised, such procedure has been held to be error (cases cited)."

Little v. *United States*, 73 F. 2d 861 (10th Cir.) at p. 864.

Accordingly it has been pointed out that the presence of a reporter in a jury room to read instructions or testimony in the absence of court and counsel may lead to irreparable damage to a litigant.

"No harm may come from it, it is true; but on the other hand, a mistake in the reading of a shorthand symbol which * * * counsel would instantly detect, an unconscious or deliberate emphasis or lack of it, an innocent attempt to explain the meaning of a word or phrase, and any other events which might readily occur; would result in irremediable prejudice * * * Underneath that phase of it lies the proposition that no one should be with the jury while it is engaged in its deliberations."

Little v. *United States*, 73 F. 2d 861 (10th Cir.), at p. 864.

In another case it has been said (*Otto* v. *Young*, 43 Misc. 628, 88 N. Y. S. 188):

> "Permitting a stenographer to enter the jury room, without the presence of the counsel, is in law the same as though any stranger were allowed to tell the jury his recollection of certain testimony given upon the trial. No one may be permitted to communicate with the jury during its deliberation—a rule equally applicable to the custodian of the jury, except that by order of the court he may ask if the jurors had agreed. Am. & Eng. Ency. of Law (2d Ed.) vol. 17, p. 1203. 'It has always been the policy of the law to watch over the deliberations of the jury with great care, and scrupulously to guard them against any extraneous influences.'
>
> Mischief may result in acquiescing in a practice which will permit a stenographer privately to read his minutes to the jury. The stenographer may not be absolutely accurate in essential points or may have omitted some of the testimony, or he may give intonations or read his notes in such a way as not to fairly represent the testimony of the witness." (Citing cases from many jurisdictions.)

The error, therefore, was clearly a fundamental one, in gross violation of traditional and most important rules governing jury trials.

(2) When plaintiff's counsel brought to the court's attention that there might be colloquy between the reporter and the jury at which counsel would not be present (106a), he clearly made known his objection to the procedure. When it was suggested by him that the reading of the charge should be done in court, in the presence of the judge and the attorneys, he clearly indicated what action he thought should be taken. This constituted a compliance

with Rule 46 which provides that a point is preserved when a party makes known to the court the action which he desires to take or his objection to the action of the court and his grounds therefor.

There is no formula or ritual that is necessary in order to preserve a point.

> "The rule does not require formality, and it is not important in what form an objection is made or even that a formal objection is made at all, as long as it is clear that the trial judge understood the party's position; the purpose of the rule is to inform the trial judge of possible errors so that he may have an opportunity to correct them."
>
> Moore's Federal Practice, Vol. 5, pp. 2504-2505, and cases cited therein.

Accordingly, the error was adequately pointed out to the judge, and the point clearly preserved.

The Court of Appeals thought that because plaintiff's counsel ultimately acquiesced in the procedure there was no error. This statement of the Court of Appeals, we submit, does not take into account the relation between court and counsel. For plaintiff's counsel to have persisted in his objection after an adverse ruling would have been contrary to orderly court procedure.

> "Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided. The notion is wholly untenable that in order to protect himself against an imputed surrender a party must reassert what has been overruled every time the occasion comes up again."
>
> *Keen* v. *Overseas Tank Ship Corp.*, 194 F. 2d 515 (2d Cir.), cert. den. 343 U. S. 966.

The Court of Appeals felt that the court's cautioning the reporter not to talk to the jurors cured the error. The trouble with that is that we do not know what happened, and may therefore not speculate that harm was not done. The presumption is that harm was done by the improper procedure.

> "In this case we know nothing of what went on while the stenographer was in the jury room; it is entirely possible that a shorthand character was misinterpreted; emphasis plays an important role in transmission of ideas by word of mouth, *and the difficult injunction of the court to avoid any emphasis is no assurance that there was none.* What else may have occurred, we do not know. No outsider has any business in the jury room; much harm could result, and that is enough. The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand." (Emphasis supplied.)
>
> *Little* v. *United States*, 73 F. 2d 861, at p. 867.

Conclusion

Petitioner respectfully submits that there are important questions relating to procedures to be followed in jury trials that should be resolved by this court. Accordingly the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

BENJAMIN H. SIFF,
Counsel for the Petitioner.
84 William Street,
New York 38, New York.

APPENDIX

Statutes Involved

Rule 46 of the Federal Rules of Civil Procedure, which provides:

> "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Per Curiam Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 69—October Term, 1960.

(Argued November 2, 1960 Decided December 1, 1960.)

Docket No. 26172

OSWALD RENDON,

Plaintiff-Appellant.

—v.—

JEAN GOLDNER,

Defendant-Appellee.

Before:

SWAN, CLARK and MEDINA, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York in a personal injury action tried before Judge Dimock and a jury whose verdict was for the defendant. Affirmed.

LANDES & WINGATE, *Attorneys for Plaintiff-Appellant.*
Benjamin H. Siff, of Counsel.

REILLY & REILLY, *Attorneys for Defendant-Appellee.*
John G. Reilly and Harold V. McCoy, of Counsel.

Per Curiam Opinion of the United States Court of Appeals

PER CURIAM:

Plaintiff and defendant were counsellors at a summer camp for children. On the evening of July 27, 1957 they took a drive in defendant's open sports car. She drove and he was a passenger sitting at her right. While proceeding on Bradley Parkway, an unlighted two-lane macadam road, in Blauvelt, N. Y., the car failed to make a left-hand curve, ran off the road, and overturned, causing injuries to the plaintiff. At the trial Judge Dimock submitted to the jury the issues of defendant's negligence and plaintiff's contributory negligence. The jury returned a verdict in favor of the defendant. As federal jurisdiction rests on diversity, New York law controls.

The appellant's principal contention is that there was no evidence of contributory negligence and therefore it was reversible error to submit that issue to the jury. Plaintiff claimed that the accident occurred because of the negligence of the defendant in driving too fast, in failing to apply her brakes in time, and in failing to use high beam lights on the unlighted road. She admitted her speed was 30 to 35 miles, that she was only 50 feet from the curve when she applied the brakes, and that her low beam lights were on from the time she entered Bradley Parkway to the place of the accident. This distance she said was between 500 and 650 feet. But plaintiff's witness, policeman Lenahan, testified that the distance was half a mile. Besides contending that there was oil on the road (denied by the policeman) which caused her car to skid, she argued that if she was negligent the plaintiff was contributorily negligent in failing to protest against the negligent manner of her driving. The judge called the jury's attention to this claim and charged: "Failure to protest where there was an opportunity to do so may be considered by you as evidence of contributory negligence." Plaintiff said that

when the car entered Bradley Parkway it was so dark that he "couldn't see too far." This, according to the policeman, was half a mile from the accident. Under New York law a plaintiff has the burden of proving that he was not contributorily negligent. *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127, 169 N. E. 112. This court cannot rule, as a matter of law, that the appellant sustained that burden. Whether plaintiff's failure to protest constituted contributory negligence was, in our opinion, a jury question. As the court stated in *Nelson* v. *Nygren*, 259 N. Y. 71, 75, 181 N. E. 52: "The question of contributory negligence ordinarily is a question of fact."

Appellant contends also that it was error to permit the reporter to enter the jury room and read the court's charge, which they asked to have repeated. Plaintiff's attorney at first stated he had no objection to this procedure; but later he suggested that the jury should be cautioned not to converse with the reporter and said: "I think that is the only danger involved." The court did caution them, and the attorney made no further objection. Under the circumstances disclosed by the record we see no error in the procedure.

Judgment affirmed.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 743

OSWALD RENDON,

Petitioner,

against

JEAN GOLDNER,

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York 5, N. Y.

REILLY & REILLY,
HAROLD V. MCCOY,
of Counsel.

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IN THE

Supreme Court of the United States

No. .....

OSWALD RENDON,

Petitioner,

against

JEAN GOLDNER,

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

This is an action to recover money damages for alleged personal injuries sustained in an automobile accident.

On a summer evening in 1957, the plaintiff, Oswald Rendon, went riding as a passenger in an M.G. automobile driven by the defendant Jean Goldner. The light sports-car overturned on a country road when its rear wheels skidded while negotiating a curve. The road bed consisted of oiled gravel (64a, 77a).

The case was tried in the United States District Court for the Southern District of New York, the Honorable EDWARD J. DIMOCK, presiding. A jury verdict was rendered for the defendant and the plaintiff appealed to the United States Court of Appeals for the Second Circuit. The verdict of the jury was unanimously affirmed.

Issues

The petitioner attempts to raise two issues in this petition for a writ of certiorari.

The argument is made that the jurisdiction of the Supreme Court of the United States should be invoked since the right to a fair jury trial was not preserved, because in this instance the Court reporter read the charge to the jury a second time in the jury room, after the plaintiff's counsel supposedly objected to this procedure and was overruled.

The argument is untenable since the premise on which it is grounded, i.e., that there was objection by the plaintiff's attorney, is without substance. Rather than objecting, plaintiff's attorney participated in, condoned, and approved the procedure adopted without exception or remonstrance.

ARGUMENT

POINT I

No question appropriate for review by the Supreme Court is presented in the petition for a writ of certiorari.

Even a cursory glance at the elements necessary for the Supreme Court to review the decision of the Court of Appeals, indicates that the special and important reasons outlined in Rule 19 of the Rules of the Supreme Court are completely absent.

The petitioner challenges no decision of any Court of Appeals. He asks for no reversal of any pertinent decisions or long standing doctrine of law. He cites only two cases with which no one can quarrel, with which we do

not disagree and with whose doctrine no departure was effected in this case.

The Court of Appeals found that the petitioner did not object to the procedure adopted in the Trial Court so that the Court was not given a fair opportunity to act with knowledge that an objection to a procedure was being voiced and pressed.

In a civil case a jury can be waived and hence it follows that so can the routine mechanics of the jury's deliberations. Of course, the Trial Court in this instance would have performed the routine task of having the charge repeated in the Courtroom, had the Court not been misled and deceived by what an appellate attorney now claims, were objections so clear and so determined that to have pressed them further would have affected the relationship between the plaintiff's attorney and the trial judge.

Despite the narrow limits of the petition, the petitioner has gone far afield by indulging in considerable irrelevant discussion of the claimed different versions of the evidence of the automobile accident given by the defendant on various occasions.

We take it most of this material was inserted despite its lack of relevancy to this petition for such subliminal effect as it might have upon the decision of this Court.

Though strongly tempted to do so (since we resisted these arguments in the Trial Court), our understanding of the function of a writ and the permissible limits of the opposition to it restrains us from answering.

We respectfully content ourselves with denying the appropriateness of the discussions of the facts of the accident and their accuracy contained on pages "4" and "5" of the petition.

The inclusion of this irrelevant material is even more striking when one appreciates that the portion of the

record concerning discussions and alleged objection of the plaintiff's attorney to the reporter entering a jury room to read the charge was not set out in the petition, so that the Court could see at a glance how spurious is the claim that not only that objection was made, but that this point was preserved for appeal.

It refutes the petition so completely that we set it out verbatim (105a to 107a inclusive)

Nothing more graphically demonstrates how the Trial Court in this case had every right to assume that plaintiff's counsel was cooperating in the procedure adopted and agreed with it.

"The Court: There is a note from the jury; gentlemen.

'May we please have the Judge's charge read to us?'

One thing would be to get them in here, tell them that would be quite an undertaking, and ask them to go back and see if they cannot pinpoint what they want a little better.

What do you think of that?

Mr. Levine: As your Honor wishes.

Mr. Reilly: May I make a suggestion to the (24) Court?

The Court: That is what I am asking for.

Mr. Reilly: I am quite willing, if your Honor pleases, that the reporter go in and read your Honor's charge to them without them coming here.

The Court: What do you think of that?

Mr. Levine: The whole charge? I say whatever your Honor rules on. I have no preference.

The Court: I never thought of having the reporter go into the juryroom and read it. Have you ever done that?

The Reporter: No.

Mr. Levine: I have no objection to that.

Mr. Reilly: I have none, and I thought it was done in this court. I thought it was done, and I am just trying to identify the occasion only for the information of the Court.

The Court: It gives them exactly what they want. My only thought was that usually communication between the bench and the jury is in the courtroom.

Another alternative would be to have the reporter sit here and read it to them.

Mr. Reilly: Good; whatever your Honor says. As I say, I just thought that it would be the easier (245) thing, and that's the only reason I made the suggestion. I can't think whether it was in Judge Byran's or Judge Murphy's courtroom that the reporter went in.

The Court: I think it sounds like a very good suggestion because if the reporter gets in there and is reading it and they don't understand part of it they can say, 'How is that again?' and they might not like to do that in the courtroom. It would be more informal. I think it is a very good suggestion.

All right. Will you go in with the charge as you have it?

Mr. Levine: Mr. Wingate suggests that that might lead to some colloquy between them or between them and the reporter that we would not be present at. He suggests that it ought to be done in here.

The Court: I think that we can trust the reporter to say that he will do nothing except read the charge as it is. Do not attempt to make any explanation whatsoever.

Mr. Levine: Then they should be cautioned not to have any conversation with respect to it, but just listen to it being read in his presence. I think that is the only danger involved.

The Court: Well, I can get them all in now, (246) tell them what I am going to do, say that the reporter will go in and read it to them, and if there is any part that they would like read over a second time he will do that, but that he is not authorized to make any explanations or suggestions to them or to answer any of their questions.

All right, will you ask them to come in?

(Jury in the box at 5:40 P.M.)

The Court: Ladies and gentlemen, I have your note which reads, 'May we please have the Judge's charge read to us?'

The reporter will go into the juryroom with you and will read the charge over to you, and if there is any particular part that you want to have read a second time, you can stop him and he will go back and read that over to you, but, of course, it is very unusual to have anybody except the jurors in the juryroom, so that you must not discuss the thing between yourselves in the reporter's presence, and he is not authorized to answer any questions of yours. The only thing that he can do is simply read what he has got on his notes, and he will read it as many times as you want him to do, but that is all that he can do for you.

(247) The Foreman: Your Honor, while the reporter is in the jury room would it be possible for him to read other excerpts of the testimony? Or would you prefer that not be done?

The Court: I think that we had better make haste slowly about that, and if you do want other excerpts make special requests for them after the charge has been read.

The Foreman: Yes, sir.

The Court: All right, you may retire. You understand that those requests would be to the Court and not to the reporter.

The Foreman: Yes, your Honor."

The foregoing demonstrates clearly why the petitioner avoids reference to the record. He prefers instead to attempt to deceive the Court by arguing that the procedures adopted were only after proper objection by plaintiff's counsel and that it would have been improper on petitioner's counsel's part to object further.

Rule 46 of the Rules of Civil Procedure is a salutary rule designed to effect the admirable purpose of eliminating formal or technical objections so long as the form of objection adopted does not deceive the Trial Judge and he understands fully that there is an objection and the grounds thereof.

Rather than objection, an examination of plaintiff's counsel's statements shows there was consent.

When the suggestion was first made, Mr. Levine, the petitioner's attorney first stated: "I say whatever your Honor rules on. I have no preference" (105a).

Thereafter, the Court made inquiries of the reporter whether he had ever done it, indicating that the Court had never thought of such a procedure. To this, Mr. Levine stated: "I have no objection to that" (105a).

After further colloquy, and after the Court indicated he was disposed to follow such procedure, Mr. Levine then stated: "Mr. Wingate suggests that that might lead to some colloquy between them or between them and the reporter that we would not be present at. He suggests it ought to be done in here" (106a).

If objection was intended, the most obtuse language possible was used and it is of course, obvious the suggestion did not even emanate from the petitioner's lawyer, Mr. Levine.

Finally, Mr. Levine requested only that the jury be cautioned not to have any conversation with respect to the charge. His last words on the subject were: "I think that is the only danger involved."

Negating even an inference that Mr. Levine even thought he had objected is the fact that this created issue was raised first in the Court of Appeals.

After the jury delivered its adverse verdict, the petitioner's attorney moved for a new trial.

The argument for a new trial was heard four days later on January 25th, 1960. During Mr. Levine's argument he made no reference at all to the reporter entering the jury room (109a-114a). His failure to do so indicates that at no time during the trial did he consider the procedure objectionable or that he considered that he had made known "• • • to the Court the action which he desires the Court to take or his objection to the action of the Court and his grounds therefor • • •" (Rule 46 of the Rules of Civil Procedure). He, of course, had ample time to raise every genuine issue at the time of this motion.

If his attorney actually intended to object, the language he employed concealed rather than revealed his disapproval. Under such circumstances, plaintiff cannot claim error on appeal because "it is not permissible to so frame an exception that it will serve to save an exception . . . yet conceal the real complaint from the trial court." *Maulding* v. *Louisville & Nashville Ry. Co.*, 168 F. 2d 880 (1948); *Krienke* v. *Illinois Cent. Ry. Co.*, 249 F. 2d 840 (1958); *Fort Worth & D. Ry. Co.* v. *Roach*, 219 F. 2d 351 (1955).

Furthermore, where the misconduct of persons affecting the jury is involved, merely calling the attention of the Court to the impropriety is insufficient; in the absence of a specific objection, it is not incumbent on the Court on its own motion to discharge the jury or take any other action. 89 C.J.S., Trial, Section 484, p. 136; Rule 46, Federal Rules of Civil Procedure; *Spreckels* v. *Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476 (1909).

Thus, the record clearly shows that plaintiff's attorney did not object when the Trial Court directed the court

reporter to enter the jury room and reread the charge to the jury.

In the absence of an objection, it has been uniformly held that directing a court reporter to reread instructions or testimony in the jury room is not reversible error. *Quinn* v. *Metropolitan St. Ry. Co.*, 218 Mo. 545, 118 S. W. 46 (Sup. Ct., Mo., 1909); *Roberts* v. *Atlanta Consol. St. Ry. Co.*, 104 Ga. 805, 30 S. E. 966 (Sup. Ct., Ga., 1898); *Hahn* v. *Miller*, 60 Iowa 96, 14 N. W. 119 (Sup. Ct., Iowa, 1882); 66 C.J.S., New Trial, Section 62, p. 189, 89 C.J.S., Trial, Section 483, p. 134.

A similar question was presented in *Vigil* v. *Atchison, T. & S. F. Ry. Co.*, 215 P. 971, 28 N. M. 581 (Sup. Ct. of N. M., 1923). There, almost all the jurors were unable to speak, read or write English. After they retired to deliberate, they requested the Trial Court to furnish an interpreter to assist them. Pursuant to this request, and while counsel for both parties were present, the Trial Court directed the official Court interpreter to enter the jury room to assist the jurors. Defendant's attorney objected a few minutes later. The Trial Court overruled his objection and he appealed when the jury later rendered an adverse verdict. The Supreme Court of New Mexico affirmed stating: "Having stood by, without objection, until the interpreter had entered the jury room, Counsel will not be heard to thereafter object."

In Federal Courts, also, if a party learns of possible misconduct affecting the jury, he must object or be considered as having waived his right to raise the question on appeal. *Upton* v. *Harrison*, 68 F. 2d 232 (1934), cert. den. 54 S. Ct. 718, 292 U. S. 633, 78 L. Ed. 1486. (Waiver where plaintiff's attorney failed to object when a juror demanded that the attorney pay an overdue bill); *Berry* v. *DeWitt*, 27 Fed. 723 (1886). (Waiver where defendant's counsel failed to object when he overheard a juror expressing an opinion about the case to the plaintiff);

Spreckels v. *Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476 (1909). (Waiver where defendant's attorney failed to object when he learned that the jurors took into their deliberations a newspaper reporting thatt he judge favored the plaintiff); Rule 46, Federal Rules of Civil Procedure.

There are two reasons for the rule:

(1) "Although we think that the conduct . . . is highly improper, Counsel could not sit silently by and take chances on a favorable verdict and then complain when it turned out to be unfavorable. He is not permitted this to 'speculate upon the chances of a verdict'." *Upton* v. *Harrison*, 68 F. 2d 232 (1934), cert. den. 54 S. Ct. 718, 292 U. S. 633, 78 L. Ed. 1486; *Roberts* v. *Atlanta Consol. St. Ry. Co.*, 104 G. 805, 30 S. E. 966 (Sup. Ct., Ga., 1898).

(2) A party is required to communicate his objection so that the Court will be apprised of the party's position and thus be able to remedy the matter. Moore's Federal Practice, Volume 5, paragraph 4602, pp. 1902, 1903. Here, if plaintiff's attorney objected immediately, the Trial Court would probably have reconsidered and required the charge to be read in open Court because he clearly understood that the practice was unusual. Even if, plaintiff's attorney objected later, after the reporter entered the jury room, the Trial Court could have examined the jurors and the reporter to determine whether anything prejudicial actually occurred in the jury room. *Wheaton* v. *U. S.*, 133 F. 2d 522 (1943); Wigmore on Evidence, 3rd Edition, Volume 8, Section 2354, (5) (a), p. 703. Plaintiff's attorney, however, failed to object at any time during the trial and thus deprived the Trial Court of any opportunity to take corrective action.

Little v. *United States*, 73 F. 2d 861, which is the case relied upon by the petitioner, was a criminal case, and even more importantly, defendant's counsel in that crimi-

nal case objected to the procedure adopted, so much so that when the Court ruled against him, the Court took it upon itself to provide for an exception for the defendant's counsel in the ruling.

Otto v. *Young*, 43 Misc. 628, 88 N.Y.S. 188, is equally inapplicable because of the proper and complete objection interposed at the time of trial.

Parenthetically, we note that again when referring to to the actual language used, petitioner's counsel argued that the Trial Court would have found the other way and that the verdict was unusual and surprising (pp. 3-4 of petition).

The Trial Court's comments on the verdict should play no part in this petition and in any event should have been set forth fully as follows so that his position is clearly demonstrated.

> "While it was a close question of fact, as a matter of fact, I think I would have been inclined to (265) decided it the other way as to whether the driver was not negligent, but still it was a question of fact. It was for the jury.
>
> I am more used to having plaintiffs' verdicts where the jury has taken a different slant from the slant that I would have taken, but just because they did go a different way does not mean that it was against the weight of the evidence to the extent that I am entitled to set it aside. If I could put my finger on anything that I think has misled or prejudiced the jury in any way, that might make a difference. If there was some obvious explanation for what I think is an unusual verdict I would feel differently, but the case was very fairly presented on both sides. I have no reason to believe that the jury was inflamed in any way or prejudiced in any way. It is just one of the results of our having somebody different from us lawyers to decide these questions of fact." (120a)

Since neither a question sufficient to invoke the jurisdiction of this Court has been presented, and further, since the arguments advanced in support of the petition are deceptive and founded upon a false premise and are devoid of merit, it is respectfully requested that the petition for a writ of certiorari be denied.

Conclusion

WHEREFORE, the respondent prays that the petition be denied and that a writ of certiorari be refused.

Respectfully submitted,

HARRY SEIDELL,
Attorney for Respondent.

HAROLD V. McCOY,
Of Counsel.